

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Amendment of Section 73.202(b),)
Table of Allotments,)
FM Broadcast Stations)
(Tishomingo, Tuttle, Woodward,)
and Alva, Oklahoma))

MM Docket No. _____
RM- _____

To: Chief, Allocations Branch

**OPPOSITION TO
MOTION TO DISMISS**

Ralph Tyler ("Mr. Tyler"), permittee of KTSH(FM), Tishomingo, Oklahoma,¹ by his attorneys, hereby respectfully submits his Opposition to the Motion to Dismiss (the "Motion") filed June 25, 1997, by Chisholm Trail Broadcasting Co., Inc. ("Chisholm"). Chisholm's Motion seeks the dismissal of Mr. Tyler's "Petition for Rule Making and Request for Issuance of Order to Show Cause" filed March 21, 1997 (the "Petition"), that proposes to reallocate Channel 259C3 from Tishomingo, Oklahoma, to Tuttle, Oklahoma, and modify KTSH's license for operation at Tuttle. In opposition to the Motion, it is stated as follows:

I. The Predicate of Chisholm's Motion to Dismiss

Chisholm is the licensee of KXLS(FM), Channel 259C1 at Alva, Oklahoma. Mr. Tyler's Petition proposes the deletion of Channel 259C3 from Tishomingo, its

¹An application for license to operate KTSH(FM) is pending before the Commission and the station is operating pursuant to program test authority. This Opposition is timely filed by July 9, 1997, since the Petition to which it responds was served by mail on June 25, 1997.

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reallotment to Tuttle, and that, as a part of the rule making process, the FCC issue an *Order* requiring Chisholm to show cause why the Commission should not modify the license of KXLS(FM) to operate on Channel 260C1. As required, Mr. Tyler agreed to reimburse Chisholm for the reasonable and prudent costs Chisholm may incur in connection with the modification, citing *FM Table of Allotments (Circleville, Ohio)*, 8 FCC 2d 159 (1967). (The Petition also proposes to modify the license of KWFX(FM), Channel 260C1, Woodward, Oklahoma, to operate on Channel 292C1.)²

Chisholm asks the Commission to dismiss Mr. Tyler's Petition on the ground that it would deprive Tishomingo of its only local broadcast service, even though Mr. Tyler showed that there is pending an application for a new noncommercial FM station at Tishomingo.³ Chisholm suggests Mr. Tyler's Petition be dismissed subject to its resubmission at a later date. Nowhere in the Motion does Chisholm make any suggestion that, ultimately, grant of Mr. Tyler's Petition *per se* would be contrary to the public

²KWFX operates on Channel 228A. Its license was modified to specify operation on Channel 261C1 as a result of a rule making proceeding. KWFX never completed the upgrade, and its construction permit to operate on Channel 261C1 was canceled at the station's request. Nevertheless, on June 11, 1997, the Commission wrote to counsel for KWFX affording an additional 30-day period to pursue its upgrade to Class C1 status, or possibly be modified to operate on Channel 292A to accommodate Mr. Tyler or another petitioner.

³Chisholm (at Motion footnote 2) argues that Mr. Tyler is in error in claiming that Tishomingo will continue to receive local service from a new noncommercial FM station since Tishomingo cannot "continue to receive" service from a noncommercial facility which does not exist. Chisholm apparently does not appreciate Mr. Tyler's hypothesis that the license of KTSH would not be modified until the new noncommercial station is in existence (assuming the Commission does not grant a waiver of its ban on removal of the last local station - See footnote 7 *infra*.)

interest. The entire predicate of Chisholm's Motion is that the Petition is premature -- "If and when construction of a new broadcast station at Tishomingo is completed and the station is on the air, Tyler may then resubmit his proposal at that time." (Motion at p. 5).

In support of Chisholm's predicate that the Petition is premature, Chisholm cites, *inter alia*, the *Change of Community Reconsideration Order* at 7097.⁴ At note 4 of the Motion, Chisholm acknowledges the pendency of an application filed by South Central Oklahoma Christian Broadcasting, Inc. on January 12, 1997. (BPED-970127MD). It has been accepted for filing, and a cut-off date is approaching.

Llano and Marble Falls, Texas, 10 FCC Rcd 4913 (1995) and *Kaukana and Cleveland, Wisconsin*, 6 FCC Rcd 7142 (1991) do not support Chisholm's request that the Commission dismiss Mr. Tyler's Petition. In fact, the recently released Report and Order in *Llano and Marble Falls, Texas*, DA 97-1115, released May 30, 1997, supports Mr. Tyler's proposal. In the Notice of Proposed Rule Making cited by Chisholm, the Commission did not dismiss the petition that proposed the removal of the last service from Llano and the replacement with a vacant channel, but instead invited the petitioner to make a showing for waiver of the ban. In the Report and Order, cited *supra*, the Commission modified the license of KBAE to operate at Marble Falls, but conditioned the grant of authorization to operate KBAE at Marble Falls on activation of newly-allotted Channel 242A at Llano as proposed by the petitioner. Mr. Tyler's situation is

⁴*Amendment of the Commission's rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd 7094 (1990). (*Change of Community Reconsideration Order*).

less remote. He has shown that an application is already pending for a new noncommercial educational FM station at Tishomingo. There is no basis to dismiss his petition because the proposed Tishomingo station is not yet in operation.

Similarly, Chisholm cites and quotes at length from *Klamath Falls, Altamont, and Butte Falls, Oregon, and Dorris, California*, 10 FCC Rcd 7583 (1995). But neither does this case support the proposition that Mr. Tyler's petition should be dismissed. And in the *Klamath Falls et al.*, case the Commission considered a petitioner's justification for removing the last local station from a community, even though the justification fell short of the mark. That's a far cry from the draconian sanction of dismissal. None of the other cases cited by Chisholm support its request for dismissal.⁵

II. A Petition for Rule Making is Acceptable Even if it is Contingent on an Event Occurring Subsequently.

Chisholm's predicate that the Petition must be dismissed is that the *Change of Community Reconsideration Order* at 7097 held that "replacement of an operating station with a vacant allotment or an unconstructed permit" is insufficient to cure the disruption occasioned by removal of an operating station. However, the issuance of a *Notice of Proposed Rule Making (N.P.R.M.)* in response to the Petition, on the one hand, and the

⁵ *Santee-Cooper Broadcasting Co.*, 99 FCC 2d 781 (Rev. Bd. 1984), *Potts Camp and Saltillo, Mississippi*, 12 FCC Rcd 3712 (1997), *Sibley, Iowa and Brandon, South Dakota*, 11 FCC Rcd 3635 (1996). In both cases, where the petitioner proposed to remove the only local service from a community, the Commission afforded the petitioner an opportunity to make a showing of public interest in support of a waiver. Neither petition was dismissed on these grounds.

issuance of an *Order* making the changes contemplated by the *N.P.R.M.*, on the other, are two very different things.

While it may be premature to issue the *Order*, it is not premature to accept the Petition for processing. This distinction was noted in *FM Table of Allotments - (Eatonton and Sandy Springs, Georgia and Anniston and Lineville, Alabama*, 6 FCC Rcd. 6580, 6582 n. 19 (Chief, Mass Media Bureau, 1991) ("*Eatonton*").

Eatonton involved a petition for rule making proposal, which, on the day it was filed, was short spaced to another allotment. On the same day the rule making petition was filed, the licensee of the protected station filed an application which, if effectuated, would have eliminated the short spacing.⁶ It was suggested that the rule making petition was premature. In *Eatonton*, the Commission recognized that a petition for rule making may be acceptable, even if it would be premature to issue an *Order* effectuating the petition:

Where, as here, the application that ultimately resulted in there being complying "transmitter sites" was filed on or before the date when the rule making request was first advanced, we see no reason the petition should be dismissed.¹⁹

¹⁹ Unlike an application, a petition for rule making contingent on the grant of an application is not prohibited by our rules. cf. 47 C.F.R. § 73.3517.

⁶South Central Oklahoma Christian Broadcasting, Inc.'s application for a new FM station to serve Tishomingo was filed on January 27, 1997 (BPED-970127MD). Mr. Tyler's Petition was filed thereafter, on March 21, 1997.

Chisholm's Motion is predicated on the proposition that grant of the petition will deprive Tishomingo of its only operating service. This would only be true were the service proposed by South Central Oklahoma Christian Broadcasting, Inc., not granted and operating at the time the Petition was granted. That contingency does not make Mr. Tyler's petition for rule making unacceptable any more than the existence of the short spacing made the petition in *Eatonton* unacceptable. The Commission, in the Report and Order in *Llano and Marble Falls, Texas*, DA 97-1115, released May 30, 1997, conditioned the modification of a station's license on the initiation of new service on a channel newly allotted to the community that otherwise would lose service. This supports Mr. Tyler's position that where a rule making petition is acceptable, even though it cannot be granted until a subsequent contingency has occurred, a Motion to Dismiss does not lie.⁷

⁷ Even if the FCC does not grant the application for a new noncommercial station at Tishomingo, the removal of a community's last local broadcast service is not necessarily fatal to a proposal such as Mr. Tyler's. In *Change of Community Reconsideration Order*, and the cases cited *supra* the Commission said it would entertain requests to waive the ban on removal of the only local broadcast service under "rare circumstances" where the removal might serve the public interest. It is premature for Mr. Tyler to make that showing, just as it would be premature to dismiss Mr. Tyler's Petition at this stage of the proceeding.

Wherefore, in light of the above it is respectfully submitted that the Motion to Dismiss filed on June 25, 1997, by Chisholm Trail Broadcasting Co., Inc. in the above-captioned proceeding be denied.

Respectfully submitted,

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July 9, 1997

CERTIFICATE OF SERVICE

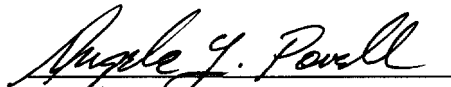
I, Angela Y. Powell, a secretary in the law offices of Smithwick & Belendiuk, P.C., hereby certify that on this 9th day of July 1997, copies of the foregoing Opposition to Motion to Dismiss were hand delivered or mailed first-class, postage pre-paid, to the following:

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